FILED

APR 30 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1172

GIUSEPPE BOZZO FU LORENZO, as owner of the STEAM VESSEL ANTOINETTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1173

A. T. ROSASCO, as owner of the STEAM VESSEL SANTA ROSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1174

MARIANO MARESCA AND COMPANY, as owner of the STEAM VESSEL MAR GLAUCO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1175

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the STEAM VESSEL BELVEDERE, her engines, boilers, and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

PETITION FOR WRITS OF CERTIORARI AND SUPPORTING BRIEF

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PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of Giuseppe Bozzo fu Lorenzo, A. T. Rosasco, Marino Maresca and Company, and "Italia"-Societa Anonima di Navigazione, respectfully alleges and propounds as follows:

Preliminary Statement

Since the facts in all of the causes above entitled are in all substantial respects identical and since all four causes were briefed and heard together in each court below—the United States District Court for the Eastern District of Pennsylvania and the United States Circuit Court of Appeals for the Third Circuit—on a statement of the facts involved in the first above-entitled cause and were in each court covered by one opinion, the petitioners herein, for the purpose of brevity, confine the following petition to a discussion of the facts, rulings below, questions, specifications of error and reasons for review as the same are to be found in the cause first above-entitled; but respectfully request that such discussion be deemed to apply to, and set forth, with the like force and effect, the facts, rulings below, questions, specifications of error and reasons for review involved in each of the three other causes.

A

Summary Statement of Matter Involved.

1

Your petitioner, Giuseppe Bozzo fu Lorenzo, claimant in the first above-entitled cause, is a citizen of the Kingdom of Italy and a resident of the City of Genoa therein,

and on and before March 30, 1941, was the sole owner of the Italian Steamship "Antoinetta", and still is the sole owner thereof save in so far as such ownership has been lost by reason of the events described hereinbelow.

2

On March 30, 1941 (R. 19a),* the libellant by its Secretary of the Treasury, purporting to act by authority of Title II, art. 1, of the Act of June 15, 1917 (40 Stat. 220; 50 U. S. C. A., c. 12, sec. 191)† seized the "Antoinetta" and took her into its protective custody.

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* This and similar notations refer to pages of the printed transcript of record filed herein.

† Title II, sections 1-4, of the Act, as set out in 50 U. S. C. A., c. 12, secs. 191-4, reads as follows:

"TITLE 50.
"WAR

* * * * *

"CHAPTER 12.—VESSELS IN TERRITORIAL WATERS OF UNITED STATES

* * * * *

"Section 191. Secretary of Treasury and Governor of Canal Zone authorized to regulate anchorage, movement, and so forth, of vessels. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

"Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

* * * * *

"§192. Seizure and forfeiture of vessels for failure to observe regulations. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this chapter, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited

3

On July 14, 1941, the United States filed a libel *in rem* against the said steamer "Antoinetta" in the United States District Court for the eastern District of Pennsylvania to the end of having her declared forfeit to the United States under the provisions of Title II, sec. 3, of the Act of Congress of June 15, 1917 (*infra*, n.), on the ground that on said March 30, 1941, and prior to the libellant's said original seizure of the vessel for protective custody, "the owners, agent, master, officer, person in charge, or members of the crew * * * within the territorial waters of the United States, with the knowledge of the owner, master, or other person in charge, or command of the vessel, wilfully did cause or permit the injury and destruction of such vessel, her engines, boilers and machinery, tackle, apparel, furniture and equipment and

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for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years, and may, in the discretion of the court, be fined not more than $10,000.

* * * * *

"§193. Destruction of, injury to, or improper use of vessels. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessels shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be punished by imprisonment for not more than ten years and shall, in the discretion of the court, be fined not more than $10,000."

* * * * *

"§194. Employment of Army and Navy to enforce provisions of chapter. The president may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this chapter."

* * * * *

did knowingly permit said vessel to be used as a place of resort for person or persons conspiring with another or preparing to commit offenses against the United States * * * and of the rights and obligations of the United States under the law of nations, and in fraud of the United States" (R. 4a-5a).

The libel further alleged that the said vessel, within the territorial waters of the Port of Chester, on July 11, 1941, while still in libellant's protective custody, as aforesaid, had been a second time seized by libellant (that is, by its Collector of Customs of the Port of Philadelphia) for condemnation and forfeiture for the said alleged crime, and had since remained in the Collector's possession or custody (R. 5a); named said claimant, Giuseppe Bozzo fu Lorenzo, as the man in whose name the vessel was registered and duly documented under the laws of the Government of Italy; prayed the issuance of process *in rem* against the said vessel and a monition to all parties in interest to appear upon the return day and show cause why condemnation and forfeiture should not be decreed for the reason aforesaid; and further prayed the entry of a decree condemning the said vessel "as forfeited to the United States" (R. 6a).

4

The *in rem* process was issued accordingly (R. 7a); a copy of the same was posted upon the said vessel on July 16, 1941 (R. 8a); and on the same day a copy of said process was delivered in the Berks County Jail at Reading, Pennsylvania, to Giovanni Lena, as her master (R. 10a).

5

On July 31, 1941, the said Giovanni Lena on behalf of your petitioner filed a claim to the said steamer

"Antoinetta", in which he alleged that your said petitioner is her true and bona fide owner and himself her true and lawful bailee on behalf of her owner, and prayed to be admitted to defend accordingly (R. 11a-12a). And in the same behalf on September 11, 1941, exceptions to the libel were filed on the grounds, among others, that the allegations of the libel were insufficient (R. 14a, 15a, 16a); charged no act that would subject the vessel to seizure and forfeiture (R. 15a, 16a) and, instead, showed her seizure to have been unfounded, void, illegal and in violation of the owner's rights, because in violation of the Fifth Amendment of the Federal Constitution and because based upon claimed violations of law, as alleged in the libel, that were wholly insufficient (R. 14a, 15a, 16a); and failed to state a cause within the District Court's Admiralty and Maritime jurisdiction (R. 17a).

6

On October 8, 1941, with the action still pending as aforesaid, libellant filed a petition in the District Court, alleging that the President, through the Maritime Commission, and, on September 29, 1941, by authority of the Act of Congress of June 6, 1941 (55 Stat. 242; 50 U. S. C. A., App. sec. 1271),* had requisitioned for national

* The pertinent part of this Act of Congress of June 6, 1941, follows: "* * * during the existence of the national emergency declared by the President on September 8, 1939, * * * the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency, charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, * * * and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended:"†

† Section 902 of the Merchant Marine Act, 1936 (49 Stat. 2015, as amended; 46 U. S. C. A., sec. 1242), authorizing the President to requisition,

purposes, as provided in said act, the use of the said vessel as "a foreign merchant vessel then lying idle in waters of the United States" and praying the entry of an

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during an emergency, vessel-tonnage owned or under construction in the United States, further provided in sub-section (a):

> "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, * * *. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition."

Sub-section (c) of the said sec. 902 (46 U. S. C. A., sec. 1242), providing that the requisition of a steamer's use, not title, should take the form of a charter as soon as the exigencies of the situation might permit, declared:

> "If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

And sub-section (d) of the said sec. 902 (46 U. S. C. A., sec. 1242) further provided:

> "In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by sections 41 (2) and 250 of Title 28" (The Tucker Act, March 3, 1887, c. 359, 24 Stat. 505, as amended).*

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* "41 (2)" in this line should read "41 (20)".

order directing the Marshal of the Court and the Collector of Customs to comply with the Maritime Commission's Notice of Taking attached to and made a part of libellant's said petition, but without prejudice to libellant's rights in the forfeiture suit or under the said Act of June 6, 1941, the Court retaining its custody and jurisdiction of the vessel in said suit (R. 19a-20a).

The Notice of Taking, so attached and made a part of the said petition, was dated September 26, 1941; was addressed to "the Owner or Owners of the Vessel (and all persons claiming an interest therein)"; and set forth that the Maritime Commission, pursuant to the said Act of June 6, 1941, "has taken over the possession and use of the above named Vessel, including all tackle, apparel, furniture, spare parts, gear and equipment, and all stores and supplies, including fuel, aboard the Vessel, effective on September 29, 1941, at 12 o'clock, noon, Eastern Standard Time, under and subject to the Terms and Conditions of the Taking, Use and Disposition of the Vessel, a copy of which will be promptly furnished."

The said Notice of Taking also purported that such taking was without prejudice to the rights of the libellant "under any executive seizure of, or forfeiture proceedings against, said vessel, heretofore or hereafter effected or instituted"; and promised finally that

> "Compensation for such taking will be determined and made in accordance with the provisions of the aforesaid Act" (said Act of Congress of June 6, 1941) (R. 23a).

7

On December 12, 1941, the District Court entered an order directing its Marshal and the Collector of Customs to comply with the said Notice of Taking, subject to the proviso that the said order and all action taken pursuant thereto should be "without prejudice to the continued custody" of the District Court over the said vessel "or to the rights of any of the parties libelant or to any of the parties respondent, or to any other interested parties, in the pending proceeding, or under said Act of June 6, 1941, the Court at all times retaining the custody and jurisdiction of said vessel in each of said proceedings" (R. 21a).*

The order further permitted the Marshal to make a Special Deputy Marshal out of the Master or other person having custody of the vessel, and directed that in such custody he deliver it to the Maritime Commission for the purposes of said requisition, but that said Special Deputy Marshal or his substitute should always remain in possession of the vessel, and that the same should be returned to the custody of the Marshal on being released from requisition by the Maritime Commission (R. 21a).

8

On July 29, 1942, the libellant, acting through the Alien Property Custodian, filed a second petition (R. 24a), alleging *inter alia* that the claimant of said vessel, your said petitioner, was an enemy without a license (R. 25a),

* The similar orders directing delivery to the Maritime Commission, of the vessels involved in the three other above-entitled cases respectively, were entered in the District Court on the dates following: Santa Rosa, August 21, 1941, (Record in No. , p. 17); Mar Glauco, December 1, 1941 (Record in No. , p. 22); Belvedere, November 3, 1941, (Record in No. , p. 17).

and that the Custodian, purporting to act under the alleged authority of the Trading with the Enemy Act of October 6, 1917, c. 106 (40 Stat. 411; 50 U.S.C.A., App.)* as

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*The pertinent sections of the Trading with the Enemy Act and the Executive Order referred to, both as amended, read as below set forth.

The Act:

"§2. Definitions. * * *

* * * * *

"The word 'person', as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

* * * * *

"The words 'to trade,' as used herein, shall be deemed to mean—

* * * * *

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

* * * * *

"§3. Acts prohibited. It shall be unlawful—

"(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

* * * * *

"§5. * * *. (a) * * * the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall describe, to any person or class of persons * * * to perform any act made unlawful without such license in section three hereof * * *; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; * * * and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

* * * * *

§7. * * *

"(b) * * *

* * * * *

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

* * * * *

"(c) If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of,

amended, and Executive Order No. 9095 of March 11, 1942 (7 F. R. 1971),† as amended, had, on July 22, 1942, found that the claimant was an alien enemy without a

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or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, * * * may be seized by the Alien Property Custodian; * * *.

* * * * *

"The sole relief and remedy of any person having any claim to any money or other property * * * seized by him shall be that provided by the terms of this Act, * * *

* * * * *

"§9. * * * (a) Any person not an enemy or ally of enemy claiming any interest, right, or title, in any * * * property * * * seized by him" (the Alien Property Custodian) "hereunder and held by him * * * or to whom any debt may be owing from an enemy * * * whose property or any part thereof shall have been * * * delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of * * * property so held by the Alien Property Custodian * * * or of the interest therein to which the President shall determine said claimant is entitled * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

The first sentence of section 5(b) of the Trading with the Enemy Act, as amended by the First War Powers Act, December 18, 1941, c. 593, Title III, sec. 301 (55 Stat. 839; 50 U. S. C. A., App., sec. 616), reads as follows:

"(1) During the time of war or during any other period of national emergency declared by the President, * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, * * *."

† Executive Order No. 9095 (7 F. R. 1971) as amended by Executive Order No. 9193 (7 F. R. 5205):

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including * * * the power to * * * vest, with respect to * * *

"(e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; * * *.

"6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian * * * all powers and authority conferred upon me by section 5(b) of the Trading with the Enemy Act as amended,

license and, by Vesting Order No. 52, had demanded, seized, and vested in himself "all right, title and interest, if any," of said claimant in the said vessel, including engines, boilers, tackle, apparel, furniture, spare parts and equipment, and all stores and fuel whether aboard the vessel or appertaining thereto and "the proceeds" of the vessel, and "any claim against the United States for compensation for anything heretofore or hereafter done under the Act of June 6, 1941," (*supra*, 6 n.), in respect to the vessel (R. 28a-29a); but alleging further that nothing in the vesting order should be construed as impairing any authority that the Maritime Commission or War Shipping Administration might have in respect to the vessel under the said Act of June 6, 1941, or Executive Order No. 8771 (6 F. R. 2759)* or any amendment thereof,

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including * * * the power to make such investigations * * * as he deems necessary or appropriate to determine whether any * * * property should be subject to his jurisdiction and control under this Executive Order. * * *

"10. * * * *(a). * * * For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended."

* This Executive Order, dated June 6, 1941, reads as follows:

"Whereas Section 1 of the Act of Congress entitled 'An Act to authorize the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes,' approved June 6, 1941, provides, in part:

* * * during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense * * *.

"And whereas I find that the foreign merchant vessels now lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, are necessary to the national defense:

"Now, Therefore, by virtue of the authority vested in me by the aforesaid act, it is hereby ordered as follows:

1. The United States Maritime Commission (hereinafter called the 'Commission') is hereby authorized and empowered, at such time

or to continue, modify or revoke any arrangements theretofore made by them in respect to the vessel (R. 30a); alleging further that

> "Nothing in this order" (Vesting Order No. 52) "shall be construed as recognizing that Claimants, or any of them, have any right, title or interest in said vessels. This order and all action taken pursuant thereto is in strict subordination to the rights of the United States including rights of forfeiture and salvage rights. It is the intention of this order to effect a complete substitution of the Alien Property Custodian for Claimants, and each of them, in respect of any right, title or interest they, or any of them, may have in any or all of said vessels" (R. 30a);

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or times and upon such terms and conditions as the Commission shall deem desirable and conducive to the national defense, to purchase, requisition, charter, requisition the use of, or take over the title to, or the possession of, any or all foreign merchant vessels which are lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, including all tackle, apparel, furniture, spare parts and equipment, and all stores, including fuel, aboard such vessels or appertaining thereto, for the use and disposition hereinafter directed.

2. Without limiting the authority of the Commission under the provisions of sections 3, 4 and 5 of said Act of Congress or under any other provision of law, the Commission is authorized and directed, to such extent and upon such terms and conditions as the Commission shall deem desirable and conducive to the national defense:

(a) To operate any or all of such vessels, either directly or by agent, in any service of the United States, or in any commerce, foreign or coastwise.

(b) To charter or lease any or all of such vessels to any persons for operation in any service of the United States, or in any commerce, foreign or coastwise: *Provided*, that no vessel shall be transferred, chartered, or leased to any belligerent government without the approval of the President.

(c) To document any or all of such vessels under the laws of the United States or any neutral country of the Western Hemisphere.

(d) To make such other use or disposition of any or all of such vessels as the President may hereafter direct.

(e) To repair, equip, and man such vessels and to do whatever may be necessary to accomplish the purposes of the said act or this order.

3. The Commission is directed to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act.

and alleging further that by reason of the premises there had been "effected a complete substitution of petitioner for the Claimant in respect of such right, title or interest, if any, as the Claimant may have had in said vessel, and petitioner is entitled to be substituted as a party herein in the place and stead of the Claimant" (R. 26a).

And the prayer of the petition was (1) that the Custodian be substituted as party in place of said claimant; (2) that all claims, pleadings, motions or exceptions filed by said claimant be as to him dismissed, denied and overruled, without prejudice to the Custodian,—that said claimant

> "be adjudged without any right, title or interest in said vessel and that such right, title and interest, if any, as the Claimant may have had therein prior to said Vesting Order be adjudged vested in petitioner",—

and that all claims, pleadings, motions or exceptions filed by said claimant be ordered to stand of record for the Custodian's benefit, pending his having an opportunity to amend, supplement or "withdraw" the same as he might be advised; and (3) that leave be granted the Custodian so to amend, supplement or "withdraw" the said claims, pleadings, motions or exceptions, or to file such others as he might be advised (R. 26a).

9

On September 19, 1942, said claimant filed his answer to said petition last above named, denying the said allegation that said claimant had no license (R. 42a) and denying knowledge or information as to said allegation of what the Custodian had found or done, but alleging that, if true, it was immaterial and irrelevant to the

Custodian's demands (R. 42a), denying that the effect of what the Custodian was alleged to have found or done had been to work a substitution of Custodian for said claimant in respect to the latter's right, title, or interest, in respect to said vessel, or to entitle Custodian to be substituted as party in place of said claimant (R. 43a), and praying that said petition be denied in all respects (R. 43a).

10

On the same day, September 19, 1942, said claimant filed notice of his motion, on the proceedings previously had and papers previously filed, for an order dismissing libellant's said petition and libel, and naming September 28, 1942, as the return date (R. 44a-45a); at which time (R. 2a) said motion as well as petition came on for hearing before the Honorable Harry E. Kalodner, United States District Judge.

11

On March 8, 1943, the said District Judge filed his opinion (R. 46a) holding that libellant's said petition should in all respects be granted and claimant's said motion in all respects denied (R. 57a). His reasons were in substance that claimant's right to defend his property against attack in court lasted only as long as he had not already lost his title to the *res;* that here he had already lost his title to the *res* either by forfeiture for crime or by capture for enemy ownership; and that, therefore, he had no further right of defense and it was libellant's prerogative to control both sides of the litigation and enter such decree as it might be advised.

12

On May 19, 1943, a decree was filed (R. 58a) pursuant to said opinion, granting the prayer of the petition "in all respects", substituting the Custodian as a party in place of claimant, dismissing, denying and overruling as to claimant all his claims, pleadings, motions and exceptions, but letting them stand for the benefit of the Custodian, to whom leave was granted to replace, amend, supplement or "withdraw" the same as he might be advised. And it was

> "Further Ordered, that said Claimant is hereby adjudged without any right, title or interest in the steam vessel 'Antoinetta', and that such right, title and interest, if any, as the claimant may have had therein prior to the Vesting Order referred to in the petition is hereby adjudged to be vested in the petitioner • • •" (R. 59a).

13

Pursuant to leave granted on August 18, 1943 (R. 60a), claimant appealed from said decree and said rulings to the Circuit Court of Appeals for the Third Circuit, where, on March 30, 1945, the appeal was heard on written and oral argument, resulting in an opinion of affirmance filed on December 13, 1945, and based upon reasoning in substance the same as that announced by the District Court (R.). And on December 21, 1945, a decree was filed affirming the decree appealed from (R.). A petition for reargument, filed within the prescribed time, was denied in an order filed on February 13, 1946 (R.).

B

Jurisdictional Statement.

1

The statutory provision sustaining the jurisdiction here invoked is section 240 of the Judicial Code as amended (Act of March 3, 1911, c. 23, sec. 240, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938; 28 U. S. C. A., sec. 347).*

2

The date of the decree sought to be reviewed—final for your petitioner (*Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52)—is December 21, 1945 (R.), as to which a timely petition for reargument was denied by an order filed February 13, 1946 (R.); the date upon which this application for certiorari is presented is April 30, 1946.

C

The Questions Presented

1

Whether an alien enemy whose property has been assailed in court by the Federal Government and who has been cited to, and does, appear and undertake to defend the *res*, may by judicial decree be deprived thereof, unheard and without a trial.

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* Section 240 of the Judicial Code, as amended and pertinent, reads as follows:

"In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2

Whether in such action the Federal Government can be heard to urge, at one and the same time, that it first acquired full title to the alien enemy's property in the *res* by forfeiture for crime and thereafter full title thereto by capture for enemy ownership, and that, by reason of such later capture, the alien enemy is barred from disputing such earlier forfeiture; and whether, having chosen to maintain its remedy of forfeiture, it is not barred, at least while still in pursuit of that remedy, from pursuing also the remedy of capture, and urging it in aid of the former remedy.

3

Whether the owner's property in a vessel whose use and possession, under the Idle Foreign Vessels Act, has been requisitioned, availed of and operated as chartered, by the Federal Government while the vessel's owner is still an alien friend, becomes, while still so possessed and operated, subject to capture under the Trading with the Enemy Act on that Government's going to war with his own.

4

Whether an alien enemy against whom and whose property relief is demanded in court by the Federal Government on the ground of having a captor's title thereto, may there question such title, and there defend against such demand, on the grounds (1) that the Trading with the Enemy Act is without application, and, even if it be not, (2) that under the laws of this country said property at all pertinent times has been and is immune to capture, (3) that at all said times its capture has been and is beyond the statutory and constitutional powers of its alleged captor, and (4) that the latter failed to perform the essential conditions precedent to the exercise of

such statutory and constitutional powers of capture as it did possess; and, if such defense be permissible, whether its validity, the face of the record does not here make manifest, as showing said property (a) to have been without the purview of the Trading with the Enemy Act, and even if not, (b) to have been property to whose safe keeping for, and return, delivery and payment to the alien enemy, the public faith was plighted, (c) to have consisted solely in and of a contractual obligation and debt of the sovereign United States and (d) never to have been found, or found to be capturable as enemy property.

5

Whether such alien enemy, even though his property in the *res* had vanished following the Federal Government's said alleged capture, was not still possessed of a defensible interest entitling him to continue his defense against the same Government's assertion of title by forfeiture, in view of his continuing interest, by means of such defense, to preserve (1) his right to damages for a tortious seizure of his said property as forfeited and (2) the trusteeship of the alleged captor of his said property for the benefit of his American creditors.

6

Whether such alien enemy's defense against the assertion of title by forfeiture could in any event be assumed by such alleged captor itself, in view of the resulting identity of interest between pursuer and defender, entailing loss at least of the District Court's jurisdiction over the controversy as to said alien enemy's property, and either loss of such jurisdiction as to all others' property, or, in case of the latter's forfeiture, an unlawful remission of the penalty incurred by the former.

7

Whether, even prior to the striking of such alien enemy's appearance and defense against such libel, the court had acquired jurisdiction thereover, in view of the libel's failure to allege a covering statute of operative force and effect as of the time of the alleged offense or to allege an offense made ground of forfeiture by that or other statute; and, if so, whether the court retained jurisdiction over the cause following libellant's adoption of the remedy provided by the Idle Foreign Vessels Act, its requisition of said property as that of the alien enemy and its removal of the *res* from the possession, custody and control of the court.

D

Specifications of Error

Error is assigned to the decree and rulings of the Circuit Court of Appeals as follows:

1. In that they deprived your said petitioner of his property without due process of law and in violation of the guaranties of the Constitution (Fifth Am'd't.)* and laws of the country.

Said the Circuit Court of Appeals (R.):

> "By this seizure the Custodian became invested with whatever right claimant had. It is, therefore, right and proper that the Custodian be substituted in the libel proceeding for the claimant since the latter has been irrevocably divested of all his interests."

And the decree it affirmed, after ordering "that all claims, pleadings, motions and exceptions heretofore filed

* "No person shall be * * * deprived of * * * property, without due process of law; * * *"

on behalf of said claimant are hereby dismissed, denied and overruled as to said claimant," added that "it is

> "Further Ordered, that said Claimant is hereby adjudged without any right, title or interest in the steam vessel 'Antoinetta' ". * * * (R. 59a).

Petitioner contends that an alien enemy, though generally without a right to seek affirmative relief in our courts, is entitled, when he or his property is there assailed, there to defend the same and, in that connection, to make use of all the appliances and instrumentalities of defense; and that a decree depriving him of his property without such a trial is worthless for any purpose, save to defeat the court's jurisdiction *ab initio.*

2. In that that they denied him the right to defend his property in court when the same was therein assailed by the Government, and, without a trial, determined his asserted property rights to be nonexistent.

The Government,—while litigating in the District Court, as libellant, its claim of title to the steam vessel "Antoinetta", including claimant's property therein, as forfeited to it for crime on March 30, 1941, and while said claimant, pursuant to citation, was there defending it as his property,—filed in the same Court, by its Alien Property Custodian, a second claim of title to claimant's interest in the *res* as enemy property captured by libellant on July 22, 1942; one year, that is, after it had commenced its suit to establish its title thereto as forfeited for crime. And, on the ground that claimant's title had thus, *either* by forfeiture, *or* by capture, been absolutely acquired by libellant not later than July 22, 1942, libellant demanded without a trial and the court entered without a trial a decree dismissing from the cause said claimant, his appearance, and, as to him,

his pleadings, substituting as claimant in his place the libellant itself, in the person of its Custodian, and adjudicating that claimant was without any right, title or interest in the *res*.

The theory upon which libellant demanded and the court ruled that claimant must be denied all rights of defense was that libellant's claim of capture was an actual, present, absolute claim,—not conditioned, as claimant urged, upon defeat of libellant's claim of forfeiture, —that its validity was not open to question by either court or claimant, and that, because of it, claimant was without a standing even to question the validity of libellant's claim of forfeiture.

Claimant's position was and is that, though an alien enemy, he had under the Constitution and laws of this country, a right to defend at the appropriate time, against both claims of the libellant—asserted, as they were, in court against his property.

3. In that they upheld the District Court, while trying the Government's claim of title to claimant's said property by forfeiture for crime, in entertaining in court a new and contradictory claim of title by the Government, viz., that it had, in the midst of such litigation, captured claimant's title to said property for enemy ownership and thereby captured his right of defense in court against either claim.

Libellant's alleged capture, for enemy ownership, of claimant's property in the said vessel and just compensation for its value and use, was, if at all, effected on July 22, 1942, (R. 25a, 30a). But libellant was then, and for a year theretofore (R. 4a) had been, litigating in the District Court its claim that it already owned all such property through forfeiture for crime.

It is claimant's position that the District Court, at least while that litigation continued, was precluded from entertaining the new and contradictory claim of capture for enemy ownership and from recognizing or giving effect to any assertion of right predicated thereon.

4. In that they upheld the District Court in permitting libellant to pursue, in respect to the same *res*, the inconsistent remedies of forfeiture and capture, and did not bar pursuit of the latter remedy; at least while pursuit of the former was still on.

The two remedies of forfeiture and capture are wholly inconsistent: One being based upon title's being in the Government; the other, on its being in an enemy. Having elected the former, the libellant—petitioner urged and urges—is, at least while still pursuing the former, denied the latter.

5. In that, after entertaining such new claim of title by capture, they determined it to be an actual, present, and effective claim, not conditional on defeat of the Government's claim of title by forfeiture, nor, in advance of that event, moot and unavailable to the Government as ground for the assertion of any right in the litigation.

The courts below held libellant's assertion of title to claimant's property by capture to be absolute and independent of its claim of title thereto by forfeiture, the Circuit Court saying (R.):

> "The rights of the Custodian, although asserted by him without prejudice to the rights of the libellant are *not subordinate to* them. * * * The Custodian's rights are *unrelated* to the forfeiture proceedings." (Emphasis supplied.)

But the vesting order itself—made a part of the petition filed by libellant through its Custodian—stipulated other-

wise. It made the rights by capture *strictly subordinate* to the rights by forfeiture. It read (R. 30a):

> "*Nothing* in this order shall be construed as *recognizing* that Claimants, or any of them, *have* any right, title or interest in said vessel. This order and all action taken pursuant thereto is *in strict subordination* to the rights of the United States including *rights of forfeiture* and salvage rights. It is the intention of this order to effect a complete substitution of the Alien Property Custodian for Claimants, and each of them, in respect of any right, title or interest they, or any of them, *may have* in any or all of said vessels." (Emphasis supplied.)

Since the asserted forfeiture title, when and if ultimately validated by decree, would relate back to, and have been in the Government, at all times since March 30, 1941, the date of the alleged offense creating such title, (*Gelston* v. *Hoyt,* 3 Wheat. 246, 311; *Henderson's Distilled Spirits,* 14 Wall. 44, 57; *United States* v. *Stowell,* 133 U. S. 1, 16; *The Annandale,* [C. A.] 2 P. D. 218, 220, affg. 2 P. D. 179, 185), there, of course, in that event, would have been no property capturable or captured by the libellant for enemy ownership on July 22, 1942. And the vesting order, recognizing that fact, as noted above, was conditioned accordingly. Libellant's brief in the Court of Appeals conceded that the capture was thus conditional upon the outcome of the forfeiture suit and could in no event become effective save in the event libellant failed to make good its forfeiture title. It read (p. 15 of libellant's Circuit Court brief in the case of the "Aussa," No. 8754 in that Court, and No. here):

> "The Alien Property Custodian by his Vesting Order • • • acquired • • • *only* such right,

> title, and interest, *if any,* as *would* be held by the Italian owners-claimants, *in the event* the United States' *claim to forfeiture is adjudged invalid.*" (Emphasis supplied.)

But the Court of Appeals, treating the claim of capture as unconditional and absolute, ruled, as to the vesting order, as follows (R.):

> "This order unconditionally * * * divested claimants of all right, title and interest in the vessels and vested these in the Alien Property Custodian."

It is claimant's position that the Circuit Court erred in treating the Custodian otherwise than as a stranger to the litigation, at least until the Government's alleged title by forfeiture had been proved nonexistent; that at such time his claim of title might conceivably present a present, justiciable controversy, but not before.

6. In that they determined libellant's new assertion in court of title by capture to be not open to inquiry by court or defense by claimant, and refused to hear, consider, or try claimant's defense, viz.: That such asserted capture had never been effected for want of property found, or found to be capturable as enemy property; and, if so, was beyond the putative captor's statutory and constitutional powers because said property was immune to capture, as being property to which the Trading with the Enemy Act was without application, as being property devoted to the service of, and under contract with, the sovereign United States, to whose safe-keeping for, and restoration, delivery and payment to claimant, the public faith was plighted, and as being property that consisted solely in and of a contractual obligation and debt, of the

sovereign United States, whose capture would mean nothing less nor other than its repudiation.

If libellant's claim of capture for enemy ownership was properly to be treated as a present, subsisting claim, affecting the course of the pending controversy as to the validity of libellant's asserted title by forfeiture for crime, as the courts below held, then, claimant contends, it was his right to defend against such claim of title by capture, for the reason underlying assignment No. 1, *supra*, viz., that it was an assault in court against his property; and that such defense, if allowed, must prevail for three reasons, viz.: (a) That petitioner's property was not subject to the provisions of the Trading with the Enemy Act because covered by a contract with the sovereign of the United States, whereas that Act applied only to property involved in trade between private American citizens or residents and the enemy; (b) that no capture had in any event been effected, since, under the Trading with the Enemy Act (sec. 7(c), *supra*, 10 n.) and sec. 10 of Executive Order No. 9095, as amended, (*supra*, 12 n.), even if they were applicable here, a *sine qua non* of the exercise by the Custodian of his power of capture is a *previous finding* by *him* of the *existence* of an enemy interest to be captured, and he could not substitute for that prerequisite the *possibility* (discussed under Assignment 5, *supra*,) of a *court's* making such finding at some time in the future (*Stoehr* v. *Wallace*, 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.*, [D. C. S. D. N. Y.], 17 F. 2d 174, 175, 178): And (c) that, even had such a preliminary *finding* been made by the *Custodian himself*, the capture of claimant's property in the "Antoinetta" was entirely beyond the Custodian's statutory and constitutional powers because, by virtue of the Idle Foreign Vessels Act and what was done thereunder, the public faith was plighted to the preservation for, and return,

delivery and payment to petitioner, of said property or its value, with hire for its use; because its immunity to capture was implicitly required by the Trading with the Enemy Act; and because—petitioner's property thus consisting solely in and of the sovereign contractual obligation and debt of the United States—its capture would amount to a repudiation of a national obligation and debt of the sovereign itself, which the law both statutory and constitutional forbade.

Petitioner's property in the vessel "Antoinetta" had been, by virtue of statutory authority, in peace-time made the subject of a requisition demise or bare-boat charter, to be thereafter executed between the Government and claimant, and performed by the Government; had been thereunder taken over and into the possession, custody and control of the Government; and, following the outbreak of war, did pursuant to said statutory authority, remain in the possession of the Government, and did continue to be operated by the Government under, and in performance of, that requisition charter (Act of June 6, 1941, *supra*, 6 n.; Joint Resolution of June 16, 1942, c. 416, 56 Stat. 370*; Act of March 24, 1943, c. 26, sec. 3(c), 57 Stat. 49 †).

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* Joint Resolution of June 16, 1942, as pertinent, read:

"To extend certain Emergency laws relating to the Merchant Marine, and for other purposes.

"* * * the provisions of each of the following Acts and resolutions, and all authority thereunder are hereby continued in full force and effect until six months after the termination of the present war shall have been proclaimed * * *: * * * Public Law 101, Seventy-seventh Congress, approved June 6, 1941" (*supra*, —). "; * * * and all authority of the Commission transferred to the Administrator of the War Shipping Administration by the President's Executive Order of February 7, 1942 (numbered 9054; 7 Federal Register, 837)† shall be performed by such Administrator in conformity with such Executive Order.

† Sec. 3(c) of the Act of March 24, 1943, read as follows:

The Act of March 24, 1943, c. 26, sec. 3(c), 57 Stat. 49, amending the Act of June 6, 1941, as amended, read as here pertinent as follows:

"(c) In the event that a vessel the title or use and possession of which is requisitioned or taken pursuant to Section 902 of the

The requisition of the vessel (in peace-time) had been accompanied with the most solemn assurances that petitioner's property therein would be respected and restored in kind or value at the end of the requisition service, together with hire for its use in the meantime.

Petitioner's sole property in the "Antoinetta", following its said taking under said requisition charter, consisted thus in and of his contractual right to recover from the United States, and its correlative contractual obligation or debt to restore or pay to him, at the end of the requisition charter, under the terms of the Act of June 6, 1941 (*supra*, 6 n.), his vessel in the same good order and condition it was in when taken, ordinary wear and tear excepted, (or in lieu thereof just compensation), and a just charter-hire for its use in the meantime. To capture claimant's property in the vessel, therefore, would be nothing other than to repudiate the sovereign's obligation to restore it and pay just compensation as aforesaid. But Congress never had purported to delegate such a power to the Executive; Congress on the contrary in the Trading with the Enemy Act (*supra*), even if here applicable, had denied it; and the general language of that Act would not warrant a contrary construction in view of the fact that, so construed, it would not only violate the Constitution, but also run counter to long and universally established principles of the law of nations. In

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Merchant Marine Act, 1936, as amended, or the Act of June 6, 1941 (Public Law 101, Seventy-seventh Congress), is in the custody of any Court, State or Federal, it shall be the duty of all agents and officers of the court having possession, custody, or control of said vessel, forthwith upon the filing with the clerk of said court of a certified copy of the order of requisitioning or taking, and without further order of the court, to comply with said requisitioning or taking and to permit the representatives of the United States Maritime Commission or the War Shipping Administration, as the case may be, to take possession, custody, and control of said vessel."

war, private obligations or debts to enemy aliens may be sequestered or confiscated; not public.

7. In that they failed to hold and decree that even if claimant, by reason of libellant's claim of title by capture, had lost all right, title and interest in the "Antoinetta," he, nevertheless, still had a defensible interest in the litigation, entitling him to defend against the libel.

Below, libellant argued and the courts held that, after the alleged capture, not only was claimant without any property in the "Antoinetta", but that he had not even any defensible interest in the outcome of the litigation that would permit him further to defend against the libel. Said the District Court (R. 49a):

> "since a claimant's right to defend the original libel for forfeiture can only rest upon his claim to the libeled property, the substitution of the Custodian for the claimant is an inevitable sequalae.";

and the Court of Appeals (R.):

> "It is * * * right and proper that the Custodian be substituted in the libel proceeding for the claimant since the latter has been irrevocably divested of all his interests."

But it was, and is, claimant's position that defense to a libel *in rem* is not necessarily restricted to one retaining title until trial: That, (1), title at time of seizure, particularly in a forfeiture suit, is a valid basis of defense, since in such a suit the prime question at issue is whether such seizure was lawful or tortious; if tortious, it is the owner as of the time of seizure who was injured and who is entitled, on defeat of the libel and non-issuance of a certificate of want of reasonable cause (R.S. 970;

28 U.S.C.A., sec. 818),* to sue, and recover damages from, the tort-feazor (*Gelston* v. *Hoyt,* 3 Wheat. 246, 314; *The Appollon,* 9 Wheat. 362, 367); and claimant here, it is not denied, was owner at the time of the "Antoinetta's" seizure and, it is not denied, still retains the interest of having the seizure pronounced unlawful to the end of recovering from the Collector, in another action, the damages he thereby sustained.

That, also, (2), avoidance of prospective loss or liability resulting from the success of such a forfeiture suit gives one, bearing a present or past contractual relationship to the *res,* an equally good right of defense, such as that of a bailee. That petitioner here is in such a position; for, if the forfeiture suit should succeed, not only would he lose his right to recover damages for a tortious seizure, as noted *supra,* but he also would lose the benefit of the continuing trusteeship of the alleged captor of his said property to meet the demands of his American creditors. If he should succeed in defeating the suit, such property would constitute such a trust, and, even though in captor hands, impose upon the captor the duty of satisfying *pro tanto* those demands (Trading with the Enemy Act, sec. 9a, *supra,* 11 n.; *White* v. *Mechanics Securities Corp.,* 269 U. A. 283, 301; *Markham* v. *Cabell,* [U. S. Sup. Ct.], Adv. Op. No. 76, December 14, 1945); and from their burden, to the extent they were so satisfied, petitioner would be forever free. But, should

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* This statute reads:

"When, in any prosecution commenced on account of the seizure of any vessel * * * made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided,* That the vessel * * * be, after judgment, forthwith returned to such claimant or his agent."

the suit succeed, his American creditors would have no alternative but to proceed against him and his European assets, which alone would then be answerable for their satisfaction.

8. In that they failed to determine and decree that libellant, acting through the Custodian, could in no event be permitted to assume the defense against libellant's own suit to forfeit claimant's property, because of the identity of interest that, in respect to libellant's controversy with the Italian owner, would then obtain between attacker and defender.

It was and is claimant's position that the only result that could ensue from a substitution of libellant, as Custodian, for claimant, would be a loss of jurisdiction in the Court further to entertain the cause of forfeiture, at least as to the Italian owner's interest in the vessel; and that this necessary consequence of such a step is sufficient to condemn it. The Circuit Court of Appeals, however, considered such objection not valid, since, it held, a judicial controversy as to forfeiture would remain between libellant and third parties, if any, having liens against the vessel. It said (R.):

> "Although the interests of the Custodian are not antagonistic to the United States as libellant, there is a justiciable case or controversy since third party interests * * * are determined by the decree."

In so ruling, the Court was but following libellant's contention, which, as there urged (p. 18 of libellant's Circuit Court brief in *The Aussa,* No. 8754 in that Court, and No. here), was that:

> "Even if there be an identity of interest status between the United States as libellant and the Alien

> Property Custodian as claimant, the United States is still entitled to final decrees of forfeiture against all other persons having or claiming any interests in the vessel, known or unknown, and whether now before the Court or not."

This, claimant denied below and denies here; contending that the forfeiture provided for by the statute relied on in the libel (Act of June 15, 1917, *supra*, 4 n.) is not of any individual interests in the offending vessel, but of the vessel herself,—and, to be availed of under that statute, must be of all interests or none. That it would in any event be a strange and anomalous proceeding in which the Government should enforce a forfeiture only against presumably innocent mortgage, maritime, attachment and stipulation lien-holders and permit the only interest charged as an offender, the owning interest, to escape the penalty. That, under the statute, if any interests in the vessel are forfeited, all are,—and, too, as of the date of the alleged offense, March 30, 1941: That, if the Government, while enforcing a forfeiture against third persons, exonerated the owner therefrom, it could only be by way of remission of a penalty already incurred; but that such remission could be lawfully granted, if at all, only by the Secretary of the Treasury after a finding by him of the owner's innocence of the very charge leveled against him in the libel (Act of June 17, 1930, c. 497, Title IV, secs. 616, 617, 618; 46 Stat 757; 19 U. S. C. A., secs. 1616, 1617, 1618:* 35 Op. Atty.-Gen.

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* These sections read as follows:

"Sec. 1616. It shall not be lawful for any officer of the United States to compromise or abate any claim of the United States arising under the customs laws for any fine, penalty, or forfeiture, and any such officer who compromises or abates any such claim or attempts to make such compromise or abatement, or in any manner relieves or attempts to relieve any * * * vessel, * * * from any such fine, penalty, or forfeiture shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not exceeding

15); and that, so far as the record shows, that official has never here attempted to exercise such a power.

9. In that they failed to determine and decree that, at least on striking claimant's appearance, the District Court had lost all jurisdictional power to do anything further in the cause save to dismiss the same for want of jurisdiction.

The basis of the foregoing assignment is claimant's contention that the striking of the appearance of a party who has appeared in response to a citation has the legal effect of recalling the citation and depriving the court of jurisdiction *ab initio*.

10. In that they failed to determine and decree that the District Court had failed to acquire jurisdiction over the cause because of the want of a statute authorizing the forfeiture of title asserted in the libel.

This is based upon claimant's contention that the Act of June 15, 1917, Title II, sec. 3 (*supra*, 4 n.), relied on in the libel as authorizing the alleged forfeiture, was without operative force or effect on March 30, 1941. The Fifth

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two years: *Provided*, That the Secretary of the Treasury shall have power to remit or mitigate any such fine, penalty, or forfeiture, or to compromise the same in the manner provided by law.

"Sec. 1617. Upon a report by a collector, district attorney, or any special attorney or customs agent, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is hereby authorized to compromise such claims, if such action shall be recommended by the General Counsel for the Department of the Treasury.

"Sec. 1618. Whenever any person interested in any vessel, * * * seized under the provisions of this chapter, * * * files with the Secretary of the Treasury * * * before the sale of such vessel * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without * * * any intention on the part of the petitioner * * * to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

Circuit Court of Appeals had so held in *Marchese* v. *United States,* 126 F. 2d 671, 673, in which ruling it had been followed by the Third Circuit Court in *Scaleggeri* v. *United States,* 126 F. 2d 1023. But below the latter Court, reversing itself, chose to follow the Maryland District Court decision to the contrary announced in *United States* v. *The Pietro Campanella,* 44 F. Supp. 348, 351-352.

11. In that they failed to determine and decree that the District Court had failed to acquire jurisdiction over the cause by reason of the want of any allegation in the libel charging the commission of the only offense named in said statute as a ground of forfeiture.

This is based upon claimant's contention that the libel alleges only willful *damage* to the vessel and *permission* to put it to the use named as unlawful in the statute; that the libel alleges no such *actual use;* and that it is only such *actual use* that the statute, when effective, makes a *ground of forfeiture* (*supra,* 4 n.).

12. In that they failed to determine and decree that the District Court had lost all jurisdiction over the cause when the libellant, in the midst of litigating its claim that the "Antoinetta" was its own vessel by reason of forfeiture, requisitioned it as the property of claimant and removed it from the Court's custody.

This is based upon claimant's contention (1) that the Government, in availing itself in peace-time of the new remedy of requisition provided by the Act of June 6, 1941, (*supra,* 6 n.), which, when availed of, in itself nullified the jurisdiction of the District Court, was bound by the terms and conditions imposed by that Act, and could not at its own will reject those and prescribe new terms and conditions of its own, less inimical to its position in the penal

litigation it was then engaged in conducting against the vessel so requisitioned; nor for the sake of that litigation, keep alive a jurisdiction that the Act, when availed of, terminated. One of those statutory conditions was libellant's recognition of title in the foreign owner; whereas the condition it sought to substitute therefor was the denial of such title and insistence on its own. Another statutory condition was the Government's assumption of obligation ultimately to restore the vessel or its value, and pay charter-hire for its use in the interim; in place of which, it chose to substitute the condition that it would so restore and pay for the vessel and her use only in the event the Court should deny its own claim of title. And claimant urged that such new terms and conditions were without force or effect; and that the requisition, accordingly, constituted an abandon-donment of the Government's forfeiture claims, and entailed a loss of the court's jurisdiction. Claimant's contention was accepted in neither court, however, the Circuit Court dismissing it as "as mere play upon words" (R.).

The assignment of error is also (2) predicated upon claimant's contention that removal of the *res* from the District Court's custody, both actual and constructive, pursuant to requisition, deprived the court of its jurisdiction in keeping with the plain intent and purpose of the Act. Neither court accepted this contention; and the Court of Appeals based its dismissal thereof upon three grounds, viz.: (a) That removal of the *res* from the court's custody was without prejudice to the continuance of its *in rem* jurisdiction because both court and libellant said it should be so; (b) that the master was appointed by the court's marshal and the *res* never left the court's custody and control; and (c) that, in any event, the just compensation provided for by the Act of June 6, 1941, constituted a substitute *res*, as would a stipulation for value filed in

court (R.), and that, thus, the Act, instead of purposing the end of the District Court's jurisdiction over the requisitioned vessel, meant, and provided means, to save it.

All three grounds, claimant urges, are untenable: The first two not only because inconsistent with the Act of June 6, 1941, (*supra,* 6 n.), as amended (*supra,* 27 n.), and with the inherent nature of the court's *in rem* jurisdiction, but also because violative of the express terms of the statute (Act of June 17, 1930, c. 497, Title IV, sec. 605; 46 Stat. 754, 19 U.S.C.A. 1605)* made controlling by the act alleged in the libel to have authorized the forfeiture (*supra,* 4 n.); and the third, because the manifest purpose of the Act of June 6, 1941, (*supra,* 6 n.), was to destroy, not save the jurisdiction, and to provide new remedies for those extinguished. So far from providing a substitute *res* to be availed of *in the action against the requisitioned vessel,* the Act, in prescribing just compensation, itself provides that the owner, to recover such as *he* claims, must begin a *new action* in the Court of Claims; and holders of liens and stipulations, to recover such as *they* claim, *new actions* in the District Court; and it leaves *no res* in court or elsewhere to abide the outcome of the *pending action,* either to be exonerated and restored to those parties or to be forfeited and either (if still unbonded) condemned, sold, and distributed as provided in sec. 613 of the Act of June 17, 1930, *supra,* (46 Stat. 756; 19 U.S.C.A. 1613),† or (if bonded) con-

* The cited section reads, as pertinent:

"All vessels * * * seized under the provisions of the customs laws * * * unless otherwise provided by law, shall be placed and *remain* in the custody of the *collector* for the district in which the seizure was made to await disposition according to law." (Emphasis added.)

† This statute reads as follows:

"§1613. Disposition of proceeds of forfeited property

"Any person claiming any vessel, vehicle, merchandise, or baggage, or any interest therein, which has been forfeited and sold under the

demned and distributed as provided in sec. 614 thereof (46 Stat. 757; 19 U.S.C.A. 1614);‡—and, as to the owner, prohibits even the deposit of compensation with the Treasurer of the United States to respond to the former's demand even in a new action in Admiralty (sec. 902 (d),

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provisions of this chapter, may at any time within three months after the date of sale apply to the Secretary of the Treasury if the forfeiture and sale was under the customs laws, or to the Secretary of Commerce if the forfeiture and sale was under the navigation laws, for a remission of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by him. Upon the production of satisfactory proof that the applicant did not know of the seizure prior to the declaration or condemnation of forfeiture, and was in such circumstances as prevented him from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to defraud on the part of the applicant, the Secretary of the Treasury or the Secretary of Commerce may order the proceeds of the sale, or any part thereof, restored to the applicant, after deducting the cost of seizure and of sale, the duties, if any, accruing on the merchandise or baggage, and any sum due on a lien for freight, charges, or contribution in general average that may have been filed. If no application for such remission or restoration is made within three months after such sale, or if the application be denied by the Secretary of the Treasury or the Secretary of Commerce, the proceeds of sale shall be disposed of as follows:

"(1) For the payment of all proper expenses of the proceedings of forfeiture and sale, including expenses of seizure, maintaining the custody of the property, advertising and sale, and if condemned by a decree of a district court and a bond for such costs was not given, the costs as taxed by the court;

"(2) For the satisfaction of liens for freight, charges, and contributions in general average, notice of which has been filed with the collector according to law;

"(3) For the payment of the duties accruing on such merchandise or baggage, if the same is subject to duty; and

"(4) The residue shall be deposited with the Treasurer of the United States as a customs or navigation fine. (June 17, 1930, c. 497, Title IV, §613, 46 Stat. 756.)"

‡ This statute reads as follows:

"§1614. Release of seized property

"If any person claiming an interest in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter offers to pay the value of such vessel, vehicle, merchandise, or baggage, as determined under section 1606 of this title, and it appears that such person has in fact a substantial interest therein, the collector may, subject to the approval of the Secretary of the Treasury if under the customs laws, or the Secretary of Commerce if under the navigation laws, accept such offer and release the vessel, vehicle, merchandise, or baggage seized upon the payment of such value thereof, which shall be distributed in the order provided in section 1613 of this title. (June 17, 1930, c. 497, Title IV, §614, 46 Stat. 757.)"

Merchant Marine Act, 1936, as amended by the Act of March 24, 1943, c. 26, sec. 3(d), 57 Stat. 49).*

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Reasons Relied on for the Allowance of the Writs

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision as follows:

It has, in its disposition of the first to fifth questions inclusive (*supra,* 17-19), deprived, and sanctioned the District Court's depriving, petitioners of their property without a hearing and in defiance of the applicable guaranties of due process.

It has, in its disposition of the second question (*supra,* 17-18), permitted, and sanctioned the District Court's permitting respondent Government to maintain in court, at one and the same time, two utterly inconsistent positions and remedies, and by means of its assertion of one to bar petitioners from contesting its assertion of the other.

It has, in its disposition of the first, third and fourth questions (*supra,* 17, 18), denied petitioners the right of urging against a judicial remedy based upon capture for enemy ownership the defense that there had never been such a capture and that, if so, the same had exceeded the alleged captor's statutory and constitutional powers.

It has, in disposing of the sixth question (*supra,* 19), permitted respondent Government both to maintain and defend against its own suit and conduct both sides of one and the same litigation.

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* "* * * the United States Maritime Commission may in its discretion deposit such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims * * *" (Emphasis supplied); that is, *third-person lien claims.*

It has, in disposing of the sixth and seventh questions (*supra*, 19-20), purported to exercise a jurisdiction denied it alike by principles of due process and positive statutory command.

II. The Circuit Court of Appeals' decision of the federal questions here presented (*supra*, 17-20), conflicts with the applicable decisions of this Court, to wit:

Its decision of the first to fifth inclusive, conflicts with *McVeigh* v. *United States*, 11 Wall. 259, *Windsor* v. *McVeigh*, 93 U. S. 274, 277, *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 22, and other cases to the same effect.

Its decision of the second, with *The Sally*, 8 Cranch. 382, 384, and *The Hampton*, 5 Wall. 372, 376; with *Flanigan* v. *Turner*, 66 U. S. 491, *Scholey* v. *Rew*, 23 Wall. 331, 351, and cases following them or kindred thereto; and with *Van Winkle* v. *Crowell*, 146 U. S. 42, 50-51, *Robb* v. *Vos*, 155 U. S. 13, 41-43, and cases to the same effect.

Its decision of the third and fourth, with *Fed. Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649, *Hirabayashi* v. *United States*, 320 U. S. 81, 91-92, and kindred cases; and with *Perry* v. *United States*, 294 U. S. 330, 352, 353, and similar cases.

Its decision of the fourth, with *Stoehr* v. *Wallace*, 255 U. S. 239, 244-245.

Its decision of the fifth, with *United States* v. *422 Casks of Wine*, 1 Pet. 547, 549-550, *Gelston* v. *Hoyt*, 3 Wheat. 246, 314, *The Appollon*, 9 Wheat. 362, 367, and kindred cases; and with *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301, *Markham* v. *Cabell*, (U. S. Sup. Ct.), Adv. Op. No. 76, Dec. 14, 1945, and cases of like character.

Its decision of the sixth, with *Lord* v. *Veazie*, 8 How. 251, *Cleveland* v. *Chamberlain*, 66 U. S. 419, and similar

cases; and with *Becker Co.* v. *Cummings,* 296 U. S. 74, 78, *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118, and cases to the like effect.

Its decision of the seventh, with *United States* v. *Hudson,* 7 Cranch 32, 33, *Brown* v. *United States,* 8 Cranch 110, 123, and similar cases; and with *Jennings* v. *Carson,* 4 Cranch 2, *The Brig Ann,* 9 Cranch 289, 291, *The Rio Grande,* 23 Wall. 458, and cases to the like effect.

III. The decision of the Circuit Court of Appeals is in conflict with the decision of other Circuit Courts of Appeals as follows: With that of the Fifth Circuit Court (*Marchese* v. *United States,* 126 F. 2d 671, 673) regarding the operative force and effect, as of March 30, 1941, of section 3 of Title II of the Act of June 15, 1917.

IV. The Circuit Court of Appeals, in disposing of the first, third and fourth questions (*supra*), has attributed to respondent Government an invulnerability to defense, in its pursuit of judicial remedy, that is in conflict with this Court's applicable decisions in *McVeigh* v. *United States, supra, Windsor* v. *McVeigh, supra,* and cases following them, and with *Hirabayashi* v. *United States, supra,* and kindred cases; and has decided questions that have never been but should be decided by this Court, viz.: (1) Whether property of an alien enemy covered by contract with, and in the possession of, the sovereign United States, nor engaged in trade with any of the citizens thereof, is subject to the terms of the Trading with the Enemy Act; (2) whether property of an alien enemy engaged in lawful intercourse, authorized not by mere license but by contract with the United States, is immune to capture by the latter even under the Trading with the Enemy Act; (3) whether property deposited with the Federal Government by an alien friend in time of peace

under an agreement for the ultimate restoration of the same or its value, with compensation for its use in the meantime, becomes, even under that Act, subject to capture on the subsequent outbreak of war between the Federal Government and the Government of such alien friend; and (4) whether, be that Act applicable or not, the sovereign obligations and debts of the Federal Government, contracted to private men, for value received therefrom, in time of peace, may thereafter, when such men have become enemies by reason of the outbreak of war between the Federal Government and their own, be captured and repudiated.

V. The Circuit Court of Appeals, in disposing of the seventh question, has decided a question that has never been but should be decided by this Court, viz., whether section 3 of Title II of the Act of June 15, 1917, (40 Stat. 220), is effective at all times or only in times of emergency and, in the latter event, when and under what circumstances it became effective in connection with the second World War.

VI. The Circuit Court of Appeals, in disposing of the seventh question, has decided a question that has never been but should be decided by this Court, viz., whether the Idle Foreign Vessels Act (Act of Congress of June 6, 1941; 55 Stat. 242), when availed of by the Federal Government to requisition and take possession of vessels in course of being proceeded against in Admiralty *in rem* actions, including forfeiture suits, destroys the jurisdiction of the Admiralty Courts further to proceed in the same.

VII. The fate of numerous vessels and vessel-titles depends upon the correct solution of the questions raised in this record, argued below and here presented. This

case might, indeed, justly be entitled "The Italian Mercantile Marine." The record shows (R. 31a-40a) twenty-nine cases pending in various District Courts of the United States in which the facts and issues are in all substantial respects identical with those here involved. But there the uniformity ends. The Courts have manifested a wide divergence of judicial viewpoint in severally disposing there of the issues presented here. In brief, it may be said that five types of decision have evolved, viz.: (1) Denial of the Custodian's petition in all respects, with leave merely to intervene granted to that official but so far unavailed of, as typified by the decisions in the District Courts for the Western District of Oregon and the Southern District of Texas respectively, in *The Leme* (unreported) and *The Mongioia* (unreported), a Certified Copy of the order in the first of which, in the absence of opinions, is here exhibited;* (2) acceptance

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*A certified copy of this order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 783 in Admiralty
ORDER
UNITED STATES OF AMERICA,
Libellant,
vs.
The Motor Vessel LEME, her engines, boilers, and machinery, tackle, apparel, furniture and equipment.

This matter having come on regularly before the Court upon the petition of Leo T. Crowley, Alien Property Custodian of the United States, to be substituted as a party in place of the claimant, and the Court having considered said motion, the briefs and oral arguments submitted in connection therewith, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that the petition of the said Alien Property Custodian to be substituted as a party in the place of the claimant be and the same is denied, but that the Alien Property Custodian may and he is allowed to intervene herein, and may, from time to time, by intervention, present to the Court such matters as he deems necessary to protect the interests of the Government in his charge.

Dated this 8th day of November, 1944.

JAMES ALGER FEE
Judge

UNITED STATES OF AMERICA
District of Oregon } ss.:

I, LOWELL MUNDORFF, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of ORDER, in

of the Custodian's claim of capture, but denial of his demand for substitution, as typified by the decisions in the District Courts for the District of Maryland (*The Pietro Campanella,* 47 F. Supp. 374) and the Eastern District of New York (*The San Leonardo,* 51 F. Supp. 107); (3) denial of all jurisdiction *ab initio,* as required by the ruling of the Fifth Circuit Court of Appeals in *Marchese* v. *United States, supra;* (4) denial of all jurisdiction after requisition and attempted capture, the position assumed in the District Court for the District of New Jersey and reversed below; and (5) complete compliance with the Custodian's demand, the position assumed by the District Court for the Eastern District of Pennsylvania and affirmed below. But except in the latter two Districts, no decrees as yet have been or could be entered,—in the opinion of counsel,—possessed of the necessary degree of finality to permit appeal, which must there await accordingly the entry of a decree following a dismissal or trial of the forfeiture suit in each District.

Nothing but a decision of this Court can finally determine, according to one controlling rule, the private and public rights and obligations there and here involved; not even a treaty between the interested sovereigns, since no treaty, any more than a legislative act, can save a constitutional sovereign from constitutional obligation, or barter or cut off right that his constitution assures to private men.

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cause No. 783 in Admiralty, UNITED STATES OF AMERICA *vs.* The Motor Vessel LEME, her engines, boilers, and machinery etc. has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 27th day of November, 1944.

LOWELL MUNDORFF, Clerk,
By F. L. Buck, Deputy Clerk
Chief

(SEAL)

In this situation, it would seem to be more than ordinarily appropriate, even apart from the high considerations of justice otherwise here present, that this Court act favorably upon the petition here presented, and consent to a review of the proceedings had below, to the end that the true rule of decision applicable to all the foregoing cases be speedily and authoritatively settled, uniformity and certainty introduced where widespread diversity and doubt now prevail, and a mass of otherwise unnecessary and wasteful litigation thus averted.

Wherefore, your petitioners respectively pray that writs of certiorari be issued by this Honorable Court in the above-entitled causes to the Circuit Court of Appeals for the Third Circuit, requiring the latter to certify the said respective causes to this Honorable Court to the end that the questions involved therein may here receive due attention and consideration, and that the decrees respectively entered therein by the said Circuit Court may be reversed accordingly.

GIUSEPPE BOZZO FU LORENZO
A. T. ROSASCO
MARIANO MARESCA AND COMPANY
"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE
All by HOMER L. LOOMIS,
Counsel for Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

HOMER L. LOOMIS, being duly sworn, deposes and says that he is a member of the bar of this Honorable Court and counsel for the respective petitioners above named; that he has read the foregoing petition and is familiar with its contents and that the same is true to the best of his knowledge, information and belief; that the reason why the said petition is verified by deponent instead of by the said respective petitioners is that none of the latter is present within the United States of America and he is duly authorized to make this verification on their behalf and stead. And deponent, as their counsel, hereby certifies that, having read the foregoing petition, he is of the opinion that it sets forth a proper case for the granting of the writs of certiorari prayed for; and further certifies that it is not filed for purpose of delay.

HOMER L. LOOMIS,
Counsel for Petitioners.

Sworn and subscribed to before me }
this 17th day of April, 1946 }

GEORGE SALTOUN
Notary Public, New York County
N. Y. Co. Clk's No. 15, Reg. No. 324-S-7
Bronx Co. Clk's No. 48, Reg. No. 202-S-7
Kings Co. Clk's No. 62, Reg. No. 398-S-7
Commission Expires March 30, 1947